SMALL MEDIUM ENTERPRISE DEVELOPMENT BANK MALAYSIA BHD v. NSE POLYMER SDN BHD & ORS

HIGH COURT MALAYA, KUALA LUMPUR
AZLAN SULAIMAN JC
[CIVIL SUIT NO: 22M-122-09-2014]
3 OCTOBER 2022

Abstract – *The execution of a judgment by a successor bank pursuant to a vesting order, does not require substitution of the plaintiff; by virtue of the vesting order, the interests of the predecessor bank are transmitted to the successor bank that the successor bank is very much a party to any proceedings. However, the execution process must be commenced expeditiously pursuant to the provisions of the Rules of Court 2012. Delay, if any, ought to be reasonably explained.*

CIVIL PROCEDURE: *Execution – Writ of execution – Application for leave – Grounds for application – Change in party entitled to execute judgment – Whether plaintiff's successor required to file application under limb (b) of O. 46 r. 2(1) of Rules of Court 2012 before filing application under limb (a) – Whether opposed to expeditious administration of justice – Whether both limbs could be invoked in one application – Delay in execution of judgment – Whether proffered reasonable grounds for delay – Whether plaintiff's successor relinquished right to execute judgment by way of agreement*

The plaintiff granted several loans to the first defendant, which were secured by charges over lands and guarantees and indemnities by the second, third, fourth and fifth defendants. When the first defendant defaulted in the repayment of the loans, the plaintiff filed the action against the defendants to recover the outstanding amounts and successfully obtained a default judgment against the fourth and fifth defendants and summary judgment against the first, second and third defendants. The plaintiff subsequently filed an application under O. 46 rr. 2(1)(a) and (3) of the Rules of Court 2012 ('ROC') for leave for SMEB Asset Management Sdn Bhd ('SMEB') to execute the judgments pursuant to the court order that certain assets of the plaintiff be transferred to and vested in SMEB, including all rights and interests in the loans. The third defendant opposed the leave application on the following grounds: (i) as the loans were vested in SMEB and no longer the named plaintiff, SMEB should have first filed an application and obtained leave under limb (b) of O. 46 r. 2(1) and then only file an application for leave under limb (a); (ii) SMEB failed to provide sufficient explanation for the delay in enforcing the summary judgment against him, as required by O. 46 r. 3(2)(b); and (iii) the judgments were controlled by an outside agreement such as to no longer entitle execution of the judgments.

Held (dismissing leave application):

(1) SMEB was not required to file an application under limb (b) of O. 46 r. 2(1) first and then only file an application under limb (a) because: (i) nowhere it is provided under O. 46 r. 2(1) that separate applications must be filed when more than one of those limbs are invoked; (ii) requiring a party to file separate applications when it is moving the court for the same purpose, *albeit* for different reasons or grounds, serves no rational or practical purpose, and was opposed to the expeditious administration of the business of the court and the administration of justice; and (iii) there was no requirement in law to effect a substitution of SMEB Assets Management for the plaintiff as a party to the action. Further leave application explained the reason why SMEB, and not the plaintiff, was seeking leave to execute the judgments. The vesting order from the plaintiff to SMEB was also adduced as an exhibit to substantiate SMEB's *locus standi*. The first ground of objection was accordingly dismissed. (paras 12-15, 18 & 19)

(2) Under O. 46 rr. 2 and 3 of the ROC, SMEB bore the primary burden of providing cogent and acceptable reasons for the delay in enforcing the judgment or order, providing such information as is necessary to satisfy the court that it was entitled to proceed to execute the judgment against the defendants and providing such information as was necessary to satisfy the court that the defendants were liable to execution. Further, the fact that O. 46 r. 3(1) allows the application under O. 46 r. 2 to be made *ex parte* necessarily meant that the plaintiff must make full and frank disclosure of the reasons for not executing the summary judgment earlier against the third defendant and for the extension beyond six years or more. In the absence of any attendant explanation by the plaintiff for the delay, the second ground of objection was found in favour of the third defendant. (paras 22, 26, 28 & 30)

(3) The counter-proposal alleged to be the outside agreement that controlled the judgment, was sent by the second defendant to counter-propose against the SMEB's letter, *inter alia*, notifying the first defendant of the outstanding amount and requesting the first defendant to make payment of RM10,000 per month. However, the absence of any agreement by SMEB to the counter-proposal meant that there was no outside agreement that controlled the judgment. SMEB had always maintained and had never relinquished its right to execute the judgments for as long as there were outstanding amounts owing under them. There was thus no outside agreement controlling the judgments and therefore, the third ground was dismissed. (paras 35 & 37-39)

Case(s) referred to:

Affin Bank Bhd v. Wan Abdul Rahman Wan Ibrahim [2003] 1 CLJ 826 CA ***(refd)***

Datuk Mohd Sari Datuk Hj Nuar v. Norwich Winterthur Insurance (M) Sdn Bhd [1992] 4 CLJ 1798; [1992] 1 CLJ (Rep) 68 SC ***(dist)***

Kay Hian Pte Ltd v. Ma Boon Lan [2014] 1 CLJ 464 CA ***(dist)***

Leong Moh Sawmill Co Sdn Bhd v. Standard Chartered Bank & Ors [1997] 2 CLJ 131 CA ***(refd)***

Mohd Kamal Omar v. United Overseas Bank (Malaysia) Bhd & Other Appeals [2018] 5 CLJ 657 FC ***(dist)***

Re: Berry Jumpo; Ex-parte: Bumiputra Commerce Finance Bhd [2005] 1 LNS 352 HC ***(dist)***

Re Liew Kong Ken Ex P Sucorp Enterprise Sdn Bhd [1998] 2 CLJ Supp 508 HC ***(dist)***

Sambu (M) Sdn Bhd v. Stone World Sdn Bhd (Formerly Known As Kostone Sdn Bhd) & Anor [1996] 2 CLJ 523 HC ***(dist)***

Tuan Ahmed Abdul Rahman v. Arab-Malaysian Finance Bhd [1996] 1 CLJ 241 FC ***(refd)***

Legislation referred to:

Banking and Financial Institutions Act 1989, s. 50(3)
Development Financial Institutions Act 2002, s. 16(3)
Rules of Court 2012, O. 46 rr. 2(1)(a), (b), (3), 3(1), (2)(b), O. 56

For the plaintiff - Fawza Sabila Faudzi; M/s Sidek Teoh Wong & Dennis
For the 3rd defendant - Yong Ke-Qin; M/s Akram Hizri Azad & Azmir

Reported by S Barathi

JUDGMENT

(Application Under O. 46 r. 2 Of The Rules Of Court 2012)

Azlan Sulaiman JC:

Overview

[1] This judgment involves, *inter alia*, an application under O. 46 r. 2(1)(a) and (b) of the Rules of Court 2012 ("the Rules") for leave to issue a writ of execution on judgments obtained against the third, fourth and fifth defendants, on two grounds:

(i) more than six years has lapsed since the date of the judgment; and

(ii) there has been a change in the party entitled to execute the judgment.

Salient Facts

[2] In 2008, 2009 and 2010, the plaintiff, Small Medium Enterprise Development Bank Malaysia Berhad, granted several loans amounting to just short of RM15m to the first defendant (collectively, "the loans"), which were secured by charges over five parcels of land (collectively, "the charged lands") and guarantees and indemnities by the second, third, fourth and fifth defendants (collectively, "the guarantee and indemnity").

[3] When the first defendant defaulted in the repayment of the loans, the plaintiff filed this action against the defendants to recover the outstanding amounts. The plaintiff obtained a default judgment against the fourth and fifth defendants on 28 October 2014 and on 24 February 2015 obtained summary judgment against the first, second and third defendants (collectively, "the judgments") for the outstanding amounts.

[4] On 21 April 2022, the plaintiff filed an application under O. 46 r. 2(1)(a) and (3) of the Rules ("the leave application") for the following orders:

1. SMEB Asset Management Sdn Bhd yang telah membeli dan mengambil alih sebahagian daripada akaun-akaun yang dimiliki dan ditadbir oleh Plaintif melalui Perintah Perletakan Hak bertarikh 26.01.2015, bebas untuk:

   (a) mengeluarkan perlaksanaan terhadap Defendan Keempat dan Defendan Kelima atas Penghakiman Ingkar Kehadiran bertarikh 28.10.2014 ("Penghakiman I");

   (b) mengeluarkan perlaksanaan terhadap Defendan Ketiga atas Penghakiman Terus bertarikh 24.2.2015 ("Penghakiman II");

   walaupun 6 tahun atau lebih telah luput sejak Penghakiman I dan Penghakiman II tersebut;

2. Kos permohonan ini adalah kos dalam kausa; dan

3. Apa-apa relif lain yang didapati adil dan suaimanfaat oleh Mahkamah Yang Mulia ini.

[5] The reason why the leave application was for leave for SMEB Asset Management Sdn Bhd ("SMEB") to execute the judgments is that, by an order dated 26 January 2015, this court had ordered those certain assets of the plaintiff be transferred to and vested in SMEB. These assets included all rights and interests' loans.

[6] Even though O. 46 r. 3(1) provides that an application thereunder "maybe made *ex parte*", on the directions of the Senior Assistant Registrar at case management, the leave application was directed to be served on the defendants. Only the third defendant opposed the leave application.

[7] On 25 July 2022, the Senior Assistant Registrar allowed the leave application, and pursuant to O. 56 of the Rules, the third defendant appealed that decision to the judge ("the third defendant's appeal").

[8] On the authority of *Tuan Hj Ahmed Abdul Rahman v. Arab-Malaysian Finance Bhd* [1996] 1 CLJ 241; [1996] 1 MLJ 30, the third defendant's appeal would be conducted by way of a re-hearing of the leave application. I heard the parties on 19 September 2022 and reserved my decision for 28 September 2022. This is that decision.

The Third Defendant's Grounds For Opposing The Leave Application

[9] The third defendant raised three main grounds for opposing the leave application and contending it should be dismissed:

(i) As the loans are vested in SMEB and no longer the named plaintiff, then SMEB should have first filed an application and obtained leave under limb (b) of O. 46 r. 2(1) and then only filed an application for leave under limb (a);

(ii) SMEB failed to provide sufficient explanation for the delay in enforcing the summary judgment against him, as required by O. 46 r. 3(2)(b); and

(iii) The judgments are now controlled by an outside agreement such as to no longer entitle execution of the judgments.

[10] The third defendant further submitted that, if the court found merit in any one of those grounds, then the leave application should be dismissed. I agree with that contention. It was then for me to deal with each ground in turn.

Ground 1: Whether SMEB Should Have First Filed An Application Under Limb (b) Of O. 46 r. 2(1) And Then Only Filed An Application Under Limb (a)

[11] Even though the leave application only mentions O. 46 r. 2(1)(a) and (3) of the Rules, prayer (1) in which leave is sought for SMEB to execute those judgments indicates that limb (b) of O. 46 r. 2(1) was also being invoked. Order 46 r. 2(1)(a) and (b) provides:

> A writ of execution to enforce a judgment or order may not be issued without the leave of the Court in the following cases:
>
> (a) where six years or more have lapsed since the date of the judgment or order.
>
> (b) where any change has taken place, whether by death or otherwise, in the parties entitled or liable to execution under the judgment or order.

[12] In my view, SMEB was not required to have first filed an application under limb (b) of O. 46 r. 2(1) and then only filed an application under limb (a).

[13] Firstly, nowhere is it provided in O. 46 r. 2(1) that separate applications must be filed when more than one of those limbs is invoked.

[14] Secondly, requiring a party to file separate applications when it is moving the court for the same purpose, *albeit* for different reasons or grounds, serves no rational or practical purpose, and is opposed to the expeditious administration of the business of the courts and the administration of justice. Certainly, it would be more expeditious and makes more sense if a plaintiff were to be allowed to invoke both limbs in just one application.

[15] Thirdly, as the plaintiff submitted in reliance on the Court of Appeal decision of *Leong Moh Sawmill Co Sdn Bhd v. Standard Chartered Bank & Ors* [1997] 2 CLJ 131, there is no requirement in law to effect a substitution of SMEB Assets Management for the plaintiff as a party to the action.

[16] In that case, the loan that was secured by a charge created by the appellant chargor in favour of Standard Chartered Bank (the foreign predecessor bank) was transferred and vested in Standard Chartered Bank Malaysia Berhad (the successor bank). The appellant applied to set aside the subsequent auction of the property on the ground that the proclamation of sale wrongly proclaimed the successor bank as the chargee. Siti Norma Yaakob JCA (as Her Ladyship then was) said:

> The vesting order of 28 April 1994 was such that there is no requirement in law to effect a substitution of the plaintiff. Paragraph 2(d) of the order states that any reference to the predecessor bank in any existing instrument of any nature vesting any title, assets or liability on the predecessor bank shall, without any further act by the predecessor bank, be construed as if the reference has been substituted with a reference to the successor bank with effect from 1 July 1994. Paragraph 2(k) of the vesting order also states that where any right or liability of the predecessor bank is to be transferred to the successor bank, then the latter shall, without any further act of the former, have the same rights, powers and remedies like commencing or defending any legal proceedings including rights and liabilities in respect of any legal proceedings pending before 1 July 1994 by or against the predecessor bank.
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> Likewise, para 2(1) of the vesting order which states that any judgment or award obtained by or against the predecessor bank and which was not complied with or yet to be satisfied shall – with effect from 1 July 1994, and without any further act of the predecessor bank – be enforceable by or against the successor bank as if the latter had become a party to the judgment or award. We consider that the effect of this particular order is that the successor bank is deemed to be a party in all proceedings that were initiated by or commenced against the predecessor bank, and for practical purposes, this means that the successor bank is very much a party to the order of sale obtained on 4 October 1985.
>
> It was pursuant to the various paragraphs in the vesting order that we have singled out that the trial judge likened the situation of the predecessor bank leaving its shell and the successor bank filling in the space left vacant by the predecessor bank. Thus, the transfer of business was to take place without any further administrative acts to be done by either the predecessor bank or the successor bank.
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> The vesting order was made under s. 50(1) of the Act and sub-s. (3) of the same section states as follows:
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> (3) Where the order of the High Court under sub-section (1) provides for the transfer of any property or business vested in or held by the transferor, either alone or jointly with any other person, then, by virtue of the order, that property or business shall, on and from the

transfer date, become vested in or held by the transferee either alone or, as the case may be, jointly with such other person, and the order shall have effect according to its terms notwithstanding anything in any law or in any rule of law, and shall be binding on any person thereby affected, regardless that the person so affected is not a party to the proceedings under this section or any other related proceedings, or had no notice of the proceedings under this section or of other related proceedings.

The only written law dealing with parties to an action is found in the Rules of the High Court 1980, and O. 15 r. 7(2) specifically deals with the change of parties under certain circumstances. For ease of reference, we reproduce that particular order and rule:

(2) Where at any stage of the proceedings in any cause or matter the interest or liability of any party is assigned or transmitted to or devolves upon some other person, the Court may, if it thinks it necessary in order to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon, order that other person to be made a party to the cause or matter and the proceedings to be carried on as if he had been substituted for the first mentioned party.

Thus, by virtue of the vesting order, there has been a transmission of interest from one legal entity to another and under the provisions of O. 15 r. 7(2), there may be a substitution of the proper party to continue with the proceedings. However, by virtue of the qualifying words 'notwithstanding anything in any law or in any rule of law' appearing in s. 50(3) of the Act, we consider that there is no necessity for a formal order under O. 15 r. 7(2) to regularise the position of the successor bank. If indeed there was any irregularity committed by the predecessor bank, it was merely its failure to withdraw and allow the sale to be conducted by the successor bank. That can be achieved by the mere production of the vesting order. In any event that omission, we consider, is not the sort of impropriety envisaged by the *Siland*'s case, where the conduct sought to be impugned amounts to a reckless disregard to the interests of an interested party. That cannot be the case here as what is being challenged is not the interest of any party but the wrong use of a name which – by virtue of the particular provisions of the vesting order, which we have already averred to, and the provisions of s. 50(3) of the Act – cannot have the effect of rendering the proclamation of sale improper and the subsequent sale annulled.

[17] Whilst I would note that *Leong Moh Sawmill*'s case involved s. 50(3) of the Banking and Financial Institutions Act 1989, nevertheless there is an equivalent provision in the Development Financial Institution Act 2002, which applies to the plaintiff and SMEB, namely s. 16(3).

[18] I would also distinguish the cases of *Re: Berry Jumpo; Ex-parte: Bumiputra Commerce Finance Bhd* [2005] 1 LNS 352, *Re Liw Kong Ken, Ex P Sucorp Enterprise Sdn Bhd* [1998] 2 CLJ Supp 508 and *Kay Hian Pte Ltd v. Ma Boon Lan* [2014] 1 CLJ 464 the third defendant cited and relied on.

All three cases involved a change in the name of the original plaintiff/judgment creditor and execution in the name of the substitute plaintiff/judgment creditor without that requisite application for a change in name. Here, prayer (1) of the leave application itself explains why SMEB (and not the plaintiff) is seeking leave to execute the judgments. Further, the vesting order from the plaintiff to SMEB was duly adduced as an exhibit to the affidavit in support of the leave application to substantiate SMEB's *locus standi* to apply.

[19] I would accordingly dismiss this first ground of objection.

Ground 2: Whether SMEB Provided A Sufficient Explanation For Its Delay In Enforcing The Summary Judgment Against The Third Defendant, As Required By O. 46 r. 3(2)(b)

[20] The starting point would of course be to ascertain what O. 46 r. 3(1) and (2)(b) of the Rules provide for and require:

> (1) An application for leave to issue a writ of execution may be made *ex parte* by a notice of application in Form 88.
>
> (2) Such an application shall be supported by an affidavit: (b) stating, where the case falls within rule 2(1)(a), the reasons for the delay in enforcing the judgment or order.

[21] In *Affin Bank Bhd v. Wan Abdul Rahman Wan Ibrahim* [2003] 1 CLJ 826; [2003] 2 MLJ 509, Arifin Zakaria JCA (as His Lordship then was) said:

> It is trite that the grant of leave under O. 46 r. 2 is in the court's discretion. Order 46 r. 3 states that an application under O. 46 r. 2(1) must be supported by an affidavit stating, when the case falls within r. 2(1)(a), the reasons for the delay in enforcing the judgment or order. Therefore, it is incumbent upon the applicant to furnish the court with sufficient reason in support of such an application. What is sufficient reason? This naturally will vary from case to case.

[22] Thus, under O. 46 rr. 2 and 3 of the Rules, SMEB bore the primary burden of providing cogent and acceptable reasons for the delay in enforcing the judgment or order, providing such information as is necessary to satisfy this court that it is entitled to proceed to execution on the judgment against the defendants, and providing such information as is necessary to satisfy the court that the defendants are liable to execution.

[23] In support of the leave application, after deposing to the judgments, SMEB Asset Management's Head of Collection provided the following information as the basis for the leave application:

(i) the winding-up of the first and second defendants on 21 April 2021 on petitions filed on 15 February 2021;

(ii) order for sale proceedings commenced on 13 January 2021 against one of the lands charged as security for the loans, which culminated in an order for sale on 22 March 2021, a successful sale by public auction on 21 December 2021, and the receipt of the proceeds of the sale on 28 March 2022; and

(iii) balance outstanding amounts still owing under the judgments after that;

(iv) the intention to proceed with execution of the judgments against the third, fourth and fifth defendants, whom the search on them discloses that they are not bankrupts; and

(v) bankruptcy proceedings could only have been instituted against them only after the first defendant was wound-up.

[24] I note that the plaintiff did not include in its written submissions any submission on the last matter, namely that bankruptcy proceedings could only have been instituted against the third defendant only after the first defendant was wound-up. The plaintiff is thereby deemed to have abandoned it.

[25] Nevertheless, in my view, several clauses in the guarantee and indemnity point to the plaintiff and SMEB's ability and liberty to have executed the judgment irrespective of the solvency status of the first defendant. The fact that several clauses are intended to have the same effect indicates that the plaintiff and SMEB intended for this ability and liberty to be cemented. These include cls. 3, 7, 8 and 9 which provide:

> 3. You shall, without reference to us be at liberty but shall not be bound to resort for your benefit to any other means of payment at any time and in any order you may think fit without thereby diminishing our liabilities and you may so long as any monies remain owing and unpaid by the Customer to you exercise your rights under this Guarantee and Indemnity Agreement for the payment of any such monies owing to you before or after resorting to other means of payment as you may think fit. In addition you shall be at liberty to require payment by us of any such monies owing to you without taking proceedings first to enforce such payment by the Customer.
>
> 7. Our liabilities and obligations created hereunder shall continue to be valid and binding for all purposes whatsoever notwithstanding any change by amalgamation, reconstruction or otherwise which may be made in your constitution or of the Customer and we hereby agree and declare that no change of any sort whatsoever in relation to or affecting the Customer shall in any way affect our liabilities and or obligations created hereunder in relation to any transaction whatsoever whether past, present or future.

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8. Recovery against us shall not in any way be barred, prejudiced, invalidated or affected notwithstanding any defect, informality or insufficiency in the borrowing powers of the Customer or the exercise thereof which might be a defence as between you and the Customer.

B

9. The winding-up or liquidation of the Customer shall not affect or determine our liabilities under this Guarantee and Indemnity Agreement but such liability shall continue in full force and effect.

[26] I would also note from the relevant cause papers adduced that the winding-up proceedings against the first and second defendants and the order for sale proceedings against the first defendant as chargor were only commenced in early 2021, just short of six years after summary judgment was obtained against them on 24 February 2015. I further note the absence of any attendant explanation by the plaintiff as to what stopped it from doing any of that any earlier, including the two-year period between a last payment made in January 2019 and the winding-up and foreclosure proceeding in January 2021.

[27] Even though the third defendant provided information which SMEB may have been able to use as an excuse or reason for not executing the summary judgment against the third defendant any earlier – which information I will deal with shortly when considering his third ground of objection – in my view they cannot. Order 46 r. 3(2) clearly requires SMEB to have provided the reasons for the delay in enforcing the judgments.

[28] Further, in my opinion, the fact that O. 46 r. 3(1) allows that application under O. 46 r. 2 to be made *ex parte* necessarily means that the plaintiff must make full and frank disclosure of the reasons for not executing the summary judgment earlier against the third defendant and for the extension beyond six years or more.

[29] In addition, the third defendant had provided that information to support its third ground of objection, namely that the summary judgment is now controlled by an outside agreement, and not as an explanation for the plaintiff to rely on for not executing the summary judgment against him earlier.

[30] I accordingly found in favour of the third defendant on this second ground of objection.

Ground 3: Whether The Judgments, Including The Summary Judgment Are Controlled By An Outside Agreement

[31] In simple terms, the third defendant contends that, because the parties had reached an agreement on the settlement on the judgments after the judgments were recorded, the judgments, including the summary judgment, are controlled by that outside agreement that binds the plaintiff/SMEB.

Thus, there are no longer any pending judgments to be enforced as the judgments and/or order have been superseded or extinguished by that outside agreement. In other words, the settlement agreement constitutes a new and independent agreement for good consideration, and the plaintiff can no longer enforce the judgments, thus negating the leave application.

[32] For this proposition, the third defendant relies on the following case authorities:

(i) *Datuk Mohd Sari Datuk Hj Nuar v. Norwich Winterthur Insurance (M) Sdn Bhd* [1992] 4 CLJ 1798; [1992] 1 CLJ (Rep) 68;

(ii) *Mohd Kamal Omar v. United Overseas Bank (Malaysia) Bhd & Other Appeals* [2018] 5 CLJ 657; and

(iii) *Sambu (M) Sdn Bhd v. Stone World Sdn Bhd* [1996] 2 CLJ 523.

[33] The facts on which the third defendant relies to contend the existence of the outside agreement governing the judgments are set out in paras. 14 to 33 of his sole afidavit bantahan opposing the leave application. Those facts may be summarised as follows:

33.1 By a letter dated 6.5.2015 from SMEB to the 1st Defendant (which referred to the 1st Defendant's letter dated 27.3.2015 and a discussion between the parties on 19.3.2015), SMEB, *inter alia*, notified the 1st Defendant that as at 31.7.2014, the amount outstanding under the Loans was RM13,608,962.33 ("the Judgment Sum"); requested the 1st Defendant to make payment of RM10,000.00 per month from March 2015 until August 2015; noted the 1st Defendants proposal to sell some of the Charged Lands to "mengurangkan baki pinjaman", and advised the 1st Defendant to "membuat pembayaran dan menjelaskan baki pembiayaan secepat mungkin".

33.2 After making payments of RM10,000.00 per month from April - December 2015, by a letter dated 1.11.2015 ("the Counterproposal"), the 2nd Defendant wrote to SMEB essentially counter-proposing that SMEB accept 40% of the Judgment Sum in full and final settlement of the Judgments, which would be settled as follows:

(i) 40% of the Judgment Sum: RM5,443,584.93

(ii) Less: payments made in 2015: RM 240.000.00

RM5,203,584.93

(iii) Balance of RM5,203,584.93 to be paid by:

(a) RM54,208.33 per month for 69 months (*ie*, from January 2016 until September 2021); and

(b) Three bullet payments of RM500,000.00 each payment each December for the years 2016, 2017 and 2018.

33.3 The 3rd Defendant contends that the Counterproposal is the outside agreement that now controls the Judgments. Thus, even though the last monthly instalment payment of RM54,208.33 made was for January 2019, SMEB is bound by the repayment terms of the Counterproposal and cannot enforce the Judgments for the full outstanding balance.

[34] I reject this contention for several reasons.

[35] Firstly, the counter-proposal was not a concluded agreement because SMEB did not accept it and there was no concluded outside agreement. The lack of any acceptance was even acknowledged by the third defendant:

(i) He signed the counter-proposal as CEO of the second defendant and, in para. 4a of the counter-proposal, he said he and the second defendant would be making those payments; and

(ii) In the second defendant's letter dated 2 April 2019 (which he also signed as CEO) the second defendant referred to the counter-proposal and said:

> We hereby demand bank to issue formal accepted letter toward our proposal. Please confirm the acceptance and we are looking forward to a long-term business relationship with SME Bank Berhad.

[36] On this score, I would also distinguish the three case authorities the third defendant relies on:

(i) In *Datuk Mohd Sari*, a consent judgment between the parties was entered against him for RM530,000, which they subsequently agreed he could settle by monthly instalments of RM25,000. However, that agreed settlement was without the default clause now commonly inserted (most probably because of that case) that entitled the judgment creditor to immediately execute the judgment for the full remaining balance if he defaulted in any one of those instalment payments. It was due to the absence of any such clause that the Supreme Court held that the consent judgment was controlled by that outside agreement.

(ii) In *Mohd Kamal Omar*, the judgment creditor obtained judgment against him for over RM79m, following which the judgment creditor filed judgment debtor summons proceedings against him. The Federal Court held that the judgment creditor was bound by the monthly instalment of RM5,000 ordered by that proceeding as it now controlled the judgment.

(iii) In *Sambu (M) Sdn Bhd*, the High Court merely affirmed the principle that, when parties settled or compromised a pending legal proceeding, that settlement or compromise constitutes a new and independent agreement between them for good consideration, by which they were bound.

[37] Simply put, the absence of any agreement by SMEB to the counter-proposal (which the third defendant acknowledged) means that there was no outside agreement that controlled the judgment.

[38] Secondly, according to SMEB's letters that the third defendant adduced, SMEB had always maintained and had never relinquished its right to execute the judgments for as long as there were outstanding amounts owing under them:

(i) In paras. 4 and 5 of its letter dated 6 May 2015, SMEB said:

> 4. Pihak tuan adalah dinasihatkan membuat pembayaran dan menjelaskan baki pembiayaan secepat mungkin. Pihak kami akan mengambil tindakan undang-undang sivil dan halang tebus ke atas hartanah yang dicagarkan bagi mendapatkan kembali baki pembiayaan selagi mana baki tersebut tidak dijelaskan sepenuhnya.
>
> 5. Pihak kami adalah tidak terikat untuk menerima atau meluluskan sebarang cadangan yang dikemukakan oleh pihak tuan. Sebarang pembayaran yang dibuat dan/atau cadangan yang dikemukakan adalah diterima 'Tanpa Prejudis' terhadap sebarang tindakan undang-undang yang sedang atau akan diambil.

(ii) In its letter dated 8 August 2017, SMEB said:

> Refer to the above matter.
>
> Please be informed that after due consideration, we have agreed to accept your interim payment arrangement proposal subject to the following conditions:
>
> i) A minimum monthly payment of RM54,000.00 for a period of twelve (12) months starting August 2017 until July 2018.
>
> ii) You are to submit a revised proposal with a higher payment amount latest on or before June 2018 for our considerations.
>
> Other terms and conditions of the facilities remain in force and unchanged.
>
> Execution of judgment will be put on hold so long as you comply with the above terms and conditions."

The second defendant reject this, by letter dated 12 August 2017.

(iii) In its letter dated 25 September 2019, SMEB said:

> After due consideration, please be informed that, on STRICTLY WITHOUT PREJUDICE, our management had decided on the followings:
>
> 1. To accept your proposal to pay RM5,000.00 per month as an interim arrangement from September 2019 until February 2020. A review on the said repayment will be conducted in February 2020.

A

2. To decline your request to discharge the charged land. However, we will consider to allow you to redeem the said land for RM2.0 million, to be paid on or before 15/12/2019.

3. To decline your request to release Dato' Haji Azhar from his guarantee for the existing loans. The release will only be considered if the entire loan or settlement amount has been fully paid.

B

Kindly take note that all payments and proposals are received on "WITHOUT PREJUDICE BASIS" and we reserve our right to enforce all remedies available against you and the Guarantors.

[39] As there was never any concluded agreement on the settlement of the C judgments and the plaintiff had at all times reserved its rights to execute the judgments for any unpaid balance, I would dismiss this third ground and hold there was no outside agreement controlling the judgments.

Conclusion

D **[40]** As I said earlier, one of those grounds was sufficient. I therefore dismissed the leave application on the ground that SMEB failed to explain its delay in executing the judgment against the third defendant.

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